IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALVIN HOLM, A.I.A.	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
	:	No. 00-CV-2893
HARRY POLLACK,	:	
Defendant.	:	

MEMORANDUM

GREEN, S.J. **October , 2001**

Presently before the Court is Sharon Pollack's Motion for a Protective Order and the Response which asks that expenses be awarded pursuant to Federal Rule of Civil Procedure 37(a)(4). For the reasons set forth below, Ms. Pollack's Motion for a Protective Order will be denied and Plaintiff's request for expenses will also be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

From approximately November 1998 to April 2001, Plaintiff, Alvin Holm, oversaw the renovation and redesign of the home of the Defendant, Harry Pollack and his wife, Sharon Pollack. (See Motion for P.O. at 1.) A billing dispute arose between the parties, and the Defendant completed the renovations on his own. (See Motion for P.O. at 2.)

In June 2001, Plaintiff filed suit in the District Court for the Eastern District of Pennsylvania alleging copyright infringement, 17 U.S.C.A. § 101 *et seq.*, and breach of contract. (See Motion for P.O. at 2.) This Court has original jurisdiction in cases involving federal questions pursuant to 28 U.S.C.A. § 1331. The Defendant counterclaimed that errors and omissions in Plaintiff's work led to excessive fees and constituted breach of the contract. (See Motion for P.O. at 2.)

On or about August 13, 2001, the Plaintiff served Sharon Pollack with a subpoena,

compelling her attendance at a deposition. (See Motion for P.O. at 2) The current motion seeks a protective order that would preclude Plaintiff from deposing Ms. Pollack, on that grounds that she can offer no relevant information regarding the issues in dispute. (See Motion for P.O. at 2.) Ms. Pollack contends that her involvement with the renovation plans were minimal and that she was not involved with the Plaintiff or his staff in any significant way. (See Motion for P.O. at 4.) Further, Ms. Pollack claims that the marital communications privilege protects any statements made between herself and the Defendant, leaving only her communication with the Plaintiff and his staff open to discovery. (See Motion for P.O., at 4.) Therefore, Ms. Pollack argues that the sole purpose of the deposition would be harassment and a protective order is warranted under Fed.R.Civ.P. Rule 26(c). (See Motion for P.O., at 5.)

The Plaintiff contends that Ms. Pollack must have some information regarding alleged errors and omissions that occurred in the home she owns and resides in. (See Response, at 1.) Plaintiff offers numerous conversations and other forms of contact with Plaintiff and members of his staff that would refute Ms. Pollack's claim that she had no significant involvement in the project. (See Response at 1.)

II. Discussion

The Federal Rules of Civil Procedure provide for liberal discovery. See Pacitti v. Macy's, 193 F.3d 766, 777 (3d Cir. 1999); Fed.R.Civ.P.26(b)(1). Generally,

> [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1). However, there are limitations on discovery of relevant, non-

privileged material. Under Fed.R.Civ.P. 26(c) a party may apply to the Court for "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." This discretionary power serves to prohibit the disclosure of information when such disclosure would result in injury, harassment or abuse of the judicial process.

With the heavy burden of persuasion borne by the party seeking a protective order, it is rare for a court to issue a protective order that prohibits the taking of a deposition. See Frideres v. Schiltz, 150 F.R.D. 153, 156 (S.D. Iowa 1993); In re McCorhill Publ'g, Inc., 91 B.R. 223, 225 (Bankr. S.D.N.Y. 1988); see also Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition and absent extraordinary circumstances, such an order would likely be in error.").

To obtain a protective order, the Third Circuit requires the party seeking the order to "show good cause by demonstrating a particular need for protection." See Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986). Good cause is established with a showing that disclosure will work a "clearly defined and serious injury" to the party seeking protection. See Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984). The alleged injury must be shown with specificity because "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a showing of "good cause." See Cipollone, 785 F.2d at 1121.

In considering whether "good cause" exists for a protective order, the district court

must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. See Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir.1994). In Pansy, the Third Circuit identified a number of factors to be considered by the district court when it conducts its balancing test, including:

(1) the privacy interests of the party seeking protection;
(2) whether the information is being sought for a legitimate purpose or for an improper purpose;
(3) whether a party benefitting from the order of confidentiality is a private litigant or a public entity or official;
(4) whether the case involves issues important to the public;
(5) whether confidentiality is being sought over information important to public health and safety; and
(6) whether the sharing of information among litigants would promote fairness and efficiency.

See Pansy, 23 F.3d at 787. In the present matter, Ms. Pollack is not claiming any harm as a result of being compelled to testify. (See Reply at 2.) Rather, she argues that there is no relevant information that would come out of her deposition to displace the harassment and inconvenience of giving the deposition. (See Reply at 2.) Ms. Pollack relies on Cantor v. Equitable Life Assurance Society of the United States, 1998 WL 544962 (E.D. Pa. Aug. 26, 1998) for the proposition that the deposition of individuals not involved in the dispute would be irrelevant and constitute harassment.

Even if this Court was to ignore the Defendant's admission that Ms. Pollack was involved in the design of the kitchens and certain other rooms, the Plaintiff's argument is unpersuasive. In Cantor, the decision to grant a protective order for a deposition was influenced by the Plaintiff's opportunity to depose five individuals, two of whom testified

that they had acted independently and without the knowledge of the individual the Plaintiff sought to depose. See Cantor, 1998 WL 544962, at *3. Thus, the Plaintiff was not stripped of his right to full discovery because he could offer "no evidence, however slight, that [the excluded witness] was involved" in the dispute and the evidence sought was obtainable through the other witnesses. See id.

In the present case, the Plaintiff's ability to rebut the allegations of the Defendant would be severely hampered if this Court took away his right to depose one of the two adults living in the house in question. The Plaintiff correctly states that the Defendant's conclusory and self-serving assessment of the knowledge of a potential witness does not impair the discoverability of that knowledge, however slight.

Additionally, absent an intrusion into the protected realm of marital communications, the Plaintiff is not prohibited from deposing Ms. Pollack or any other potential witness. The marital communications privilege protects words or acts intended as communications from a spouse that are communicated during a valid marriage. See Puricelli v. Houston, 2000 WL 298922 at *8 (E.D. Pa. Mar. 14, 2000). After the moving party has overcome these limitations on the privilege, confidentiality is presumed. See Caplan v. FellheimerEichen Braverman & Kaskey, 162 F.R.D. 490, 491 (E.D. Pa. 1995). However, this confidentiality may be overcome when the nature or circumstances of the communication establish that the words or acts were obviously not intended to be confidential. See id. (citing Wolfe v. United States, 291 U.S. 7 (1934)). Such circumstances include when the communication was made in the presence of third persons or in such a manner that it is likely to be heard by a third person. See id.

Ms. Pollack shows no reason why traditional objections under the Federal Rules of Civil Procedure would not sufficiently protect her rights and expectation of privacy. The information being sought appears to be connected to the legitimate purpose of preparing a thorough claim. Therefore, weighing the interests of fairness and efficiency in regard to the parties and the public, I conclude that the relevant factors favor denying the protective order.

Regarding the Plaintiff's request for costs in accordance with Fed.R.Civ.P. Rule 37, I find no evidence that Ms. Pollack acted in bad faith when bringing this motion. Absent the insufficient sources of information that exist in this matter, Ms. Pollack's motion may have been granted in accordance with the current law. Therefore, I see nothing to justify awarding fees in this matter.

An appropriate Order follows.

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Plaintiff,	:	
v.	:	
	:	No. 00-CV-2893
HARRY POLLACK,	:	
Defendant.	:	

ORDER

AND NOW, this day of October, 2001, upon consideration of Sharon Pollack's Motion for a Protective Order and Plaintiff Alvin Holm's request for sanctions,

IT IS HEREBY ORDERED that Ms. Pollack's Motion and Plaintiff's request are **DENIED**.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.